IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

APPEAL FROM ORDER NO.554 OF 2005
IN
NOTICE OF MOTION NO.741 OF 2005
IN
B.C.C.SUIT NO.1497 OF 2005

Jayesh D. Goragandhi — Appellant
vs.
1. Jaywant Ganpat Bhandari & ors. — Respondents

Mr.Janak Dwarkadas, senior counsel with Mr.J.Reis with Mr.Y.M.Chaudhari i/b.M/s.Jhangiani & Associates for the appellant.

Mr.A.Y.Sakhare, senior counsel with Mr.M.U.Pandey and Mr.Rakesh M.Pandey for the respondents 1 to 4.

Ms.Geeta Joglekar for the respondent no.8-B.M.C.

CORAM : B.H. MARLAPALLE,J.

ORDER RESERVED ON : 24th August 2005

ORDER PRONOUNCED ON: 30th August 2005

P.C.

Heard Mr.Janak Dwarkadas, the learned senior counsel with Mr.J.Reis, the learned counsel for the appellant-original defendant no.2 and Mr.A.Y.Sakhare, the learned senior counsel with Mr.M.U.Pandey for the respondents 1 to 4-original plaintiffs and Mrs.Geeta Jogalekar, the learned counsel for the respondent no.8-B.M.C.

2. This appeal assails the order dated 16th March 2005

passed by the learned Judge of the City Civil Court, Greater Mumbai in Notice of Motion No.741/2005 filed in B.C.C.Suit No.1497/2005. The said notice of motion has been partly allowed by the following order:

> i) Defendant Nos. 1 to 4 their servants and agents and persons claiming under them are hereby restrained by ad-interim injunction not to construct on survey no.191, Hissa No.4 and hissa no.8 till the decision of the present suit.
>
> ii) The prayer for ad interim mandatory injunction against the defendant no.5 M.M.C. is hereby rejected."

3. The first part of the operative order has been challenged by the appellant.

4. There is no dispute that the plaintiffs had executed the agreement for sale dated 8th October 1979 in favour of the late father of defendants 1 to 4 in respect of the plot of land bearing survey no.191, Hissa nos. 4 and 8 totally admeasuring about 2605.167 sq.mts. of village-Eksar, taluka Borivali, a suburb of Mumbai. The plaintiffs had also executed a Power of Attorney for the development of the said land in favour of the late father of defendants 1 to 4 i.e. Mr.Dhanesh Harilal Goragandhi and Mr.Satish Vithaldas Bhansali. On the basis of the said agreement and the Power of Attorney, the father of the defendants developed the plot in Hissa no.8 and after obtaining due permission from the respondent no.8-corporation constructed one multi-storey building and four bungalows adjoining the said building

in the year 1984.

5. As per the plaintiffs, the agreement for sale dated 8th October 1979 was revoked/terminated on 6th November 1984 on account of failure to comply with the terms and conditions set out therein by the father of defendants 1 to 4. The defendants father died in the year 1990 and in 1991 the FSI was extended by the Corporation. Suit No.8138/1984 came to be filed before the City Civil Court at Mumbai and Notice of Motion No.6469/84 filed in the said Suit was dismissed on 19th December 1985. The said order was challenged in A.O.No.17/1986 before this Court and on the basis of the undertaking furnished by the defendants, the said A.O. was disposed off on 20th January 1986. The defendants had given an undertaking to this Court that while disposing off the flats the pendency of the suit no.8138/84 would be intimated to the prospective flat purchasers and the said transaction would be subject to the decision in the Suit. Accordingly, the flats in the multi-storey building were sold to third parties.

6. It appears that the defendants demolished the four bungalows located on hissa no.8 and decided to construct a multi-storey building (7 storeyies) by loading additional TDR. They had submitted plans to the respondent no.8-Corporation for approval. The plaintiffs learnt about the said move and, therefore,

issued a written notice to some of the defendants on 25th November 2003 pointing out that the agreement dated 2nd October 1979 was terminated on 6th November 1984 and on the demise of Mr.Dhanesh Goragandhi, the Power of Attorney dated 2nd October 1979 did not remain in force. Thus, the defendants had no authority in law to carry out any construction on the plot of land described as hissa no.4 and/or hissa no.8 of survey no.191. A notice dated 25th November 2003 was also addressed to the respondent-Corporation by the plaintiffs. Notwithstanding these objections, the defendants allegedly proceeded with the construction on the basis of the plans approved by the Corporation. It appears that the plans were originally approved on or about 18th November 2002 and subsequently by withdrawing the same approval fresh plans were approved on or about 5th July 2004 on the basis of the application under the signature of Mr.Jayesh Goragandhi i.e. the present appellant. When the B.C.C.Suit No.1497/2005 was filed before the court below the construction was purportedly in progress and when the impugned order was passed the construction of seven storey building was almost completed. As per the learned senior counsel for the appellant in place of total FSI of 8500 sq.ft. available on demolition of the four bungalows, the newly constructed seven storied building has a built up area of 26,000 sq.ft. with additional TDR and the building is ready for occupation. However, on account of the impugned order, third party

rights could not be created. It is submitted by the learned senior counsel for the appellant that daughters of plaintiff no.1 had taken out Notice of Motion no.1514/2004 in S.C.Suit No.8138/84 for the same reliefs and the said notice of motion was dismissed by the City Civil Court on 2nd September 2004 and when the said move failed, the plaintiffs have instituted a fresh suit for permanent injunction. For the same reasons as set out in the order dated 2nd September 2004 dismissing the Notice of Motion no.1514/2004, Notice of Motion no.741/2005 was also dismissed. The reasoning set out by the learned Judge in support of the impugned injunction order is wholly erroneous and, in any case, there was no justification to issue an injunction in respect of the newly constructed building on hissa no.8 which has been constructed on the same plot on which four bungalows were constructed in 1984 itself.

7. On the other hand, Mr.Sakhare, the learned senior counsel has supported the impugned order. The plaintiffs contend that once the agreement for sale was terminated way back on 6th November 1984 and the Power of Attorney ceased to have any force on the demise of Mr.Dhanesh Goragandhi, none of the defendants had any authority in law to apply to the respondent no.8-corporation for permission to undertake new construction either on plot of land located in hissa no.8 or hissa no.4. The respondent no.8-Corporation

approved the plans and granted commencement certificate without verifying the title of the defendants or their legal authority. The construction made is, thus, wholly illegal and, therefore, the trial Court has rightly granted temporary injunction pending the suit.

8. The agreement dated 2nd October 1979 shows that the vendors had agreed to sell the suit land at the price to be ascertained at the rate of Rs.25/- per sq.ft. of the built up area which may be allowed to be constructed in accordance with the B.M.C. sanction pending plans on the basis of the FSI available at 1:1. The total land in both hissa no.4 and hissa no.8 admeasured 2605.167 sq.mts. which comes to about 26,052 sq.ft. The Power of Attorney dated 2nd October 1979 was also executed in favour of the late Dhanesh Goragandhi and Mr.Satish Vithaldas Bhansali by the plaintiffs. The defendants contend that the Power of Attorney would not cease to have force on account of the demise of their father and the said Power of Attorney would be available in their favour. This is an issue which will have to be examined by the trial Court. The trial Court has held against the defendants stating that during the last more than 20 years or so, they did not take any legal steps for the specific performance of the agreement dated 2nd October 1979 and, therefore, they are estopped from claiming the title to the suit property. The fact remains that hissa no.8 remained undeveloped, but hissa no.8 was fully

developed and the construction of the new seven storey building has come up on the plot located on hissa no.8 and in place of the area where four bungalows were constructed in 1984. The defendants had offered an amount of Rs.14 lacs or so by cheque dated 8th October 1994 and the same was returned by the plaintiffs on or about 8th November 1994. The plaintiffs were aware that plot No.8 was fully developed and did not take any legal steps for recovery of the sale consideration of Hissa No.8, at any time during the last about 20 years. This goes against them equally and prima facie they can not now claim the agreement to have been terminated in respect of Hiss No.8. During the pendency of the Suits, interlocutory orders must protect the interest of both the parties. The injunction order impugned does not call for any interference in respect of the plot in hissa no.4 which remained undeveloped all along and admittedly as at present it is a open plot. However, blanket injunction not to construct on hissa no.8 till the decision in S.C.Suit no.1497/2005 has no force as at present inasmuch as the construction is completed. In fact, it must be noted that a similar situation had arisen in A.O.no.17/1986 before this Court when the first building on hissa no.8 was constructed in 1984 and when the notice of motion no.6469/84 was dismissed on 19th December 1985, this Court was required to consider the issue of third party interests being created in respect of the flats/tenements which were ready for

occupation. A.O.No.17/1986 came to be disposed of by the order dated 20th January 1986 by noting the undertaking given by the defendants builders. Equity demands that the same is followed even now in respect of the second building which has already come up in place of the four old bungalows on hissa no.8.

9. In the result, this appeal is disposed of by modifying the impugned injunction order as under:

(a) Defendants 1 to 4, their servants and agents and the persons claiming under them are hereby restrained by ad-interim injunction not to construct on survey no.191, hissa no.4 till the decision of S.C.Suit no.1497/2005.

(b) Third party interests created in respect of the flats/tenements in the newly constructed seven storey building on hissa no.8 shall be at the risk of the defendants and subject to the decision in the S.C.Suit no.1497/2005 and the defendants shall intimate in writing the same to the prospective purchasers of the said flats/tenements. The defendants shall not claim any equity in

future if they fail in the pending suits.

(B.H. MARLAPALLE,J.)

. After the order was pronounced, the learned counsel for the respondent nos. 1 to 4 at this stage submitted an oral application praying for stay of this order.

. Application is hereby rejected.

(B.H. MARLAPALLE,J.)